Supreme Court, U.S.
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No. 09-929

In The
Supreme Court of the United States

JACK HARGROVE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1346, which defines the term "scheme or artifice to defraud" in the mail and wire fraud statutes, 18 U.S.C. 1341 and 1346, to include a scheme "to deprive another of the intangible right of honest services," is unconstitutionally vague.

2. Whether the district court should have instructed the jury that petitioner's receipt of compensation as a corporate officer did not constitute "private gain" from his honest-services fraud scheme.

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REPLY BRIEF FOR PETITIONER

1. Whether 18 U.S.C. 1346, which defines the term "scheme or artifice to defraud" in the mail and wire fraud statutes, 18 U.S.C. 1341 and 1346, to include a scheme "to deprive another of the intangible right of honest services," is unconstitutionally vague.

At p. 4 of its brief, the government suggests [that] the Court hold this petition pending the decisions in *Skilling, Black,* and *Weyhrauch,* and then dispose of it as appropriate in light of those decisions. Petitioner concurs.

2. Whether the district court should have instructed the jury that petitioner's receipt of compensation as a corporate officer did not constitute "private gain" from his honest-services fraud scheme.

The government seemingly contends that petitioner's instruction issues are not properly before the Court for consideration. Gov. Brf. at pp. 5-6 and n. 2. The government's position is unavailing based on the record below. As example, at App. 66-67 of petitioner's certiorari petition, he reproduced some of his Rule 30 objections, including, *inter alia:*

> 2. Instructions 32 and 35: Instruction 35 states, "In order to prove a scheme to defraud, the government does not have to prove that the defendants contemplated actual or foreseeable harm to the victims of the scheme." The instruction is a correct statement of Seventh Circuit law. *See United States v. Hausman,* 345 F.3d 952 (7th Cir.

2003); *United States v. Fernandez,* 282 F.3d 500 (7th Cir. 2002). The circuits, however, are badly divided on the meaning of the "honest services" mail fraud statute. The varying approaches are discussed in *United States v. Rybicki,* 355 F.3d 124, 145-46 (2nd Cir. 2003) (*en banc*). Some circuits have opted for a materiality test. *Id.* Others require a violation of state law, or state law creating a fiduciary duty, to be the foundation for an "honest services" mail fraud offense. *See United States v. Murphy,* 323 F.3d 102, 109-10 (3rd Cir. 2003); *United States v. Brumley,* 116 F.3d 728, 733 (5th Cir. 1997) (*en banc*); see also *United States v. Martin,* 195 F.3d 961, 966 (7th Cir. 1999) ("tying the concept of fraud in the mail fraud statute to state law and to federal statutes expressly creating federal duties would ally the persistent concerns about the breadth and vagueness of the statute"). Still other circuits require that the defendant intend economic harm. *See United States v. Vinyard,* 266 F.3d 320 (4th Cir. 2001); *United States v. de Vegter,* 198 F.3d 1324 (11th Cir. 1999); *United States v. Sun-Diamond Growers of California,* 138 F.3d 961 (D.C. Cir. 1998). Hargrove submitted an instruction (# 17), refused by the Court, that required proof that the defendant intended economic harm to the victim. Hargrove Instruction 17 should have been given, and Instructions 35 (and 32) should have been refused. Orig. R. 205 at ¶ 2.

Moreover, in his timely post-trial filing, petitioner asserted:

> During the jury deliberations the jurors sent multiple notes with questions to the Court. The extent that Mr. Hargrove objected to the Court's answers, Mr. Hargrove stands by his oral objections. Specifically, the Court erred in failing to inform the jury that receiving a salary from the company does not constitute "personal benefit" or "personal gain" within the meaning of the jury instructions. App. 59, R. 224 at pp. 5-6, ¶ 16.[1]

Furthermore, on CA 7 direct appeal, at p. 32 of his opening brief, petitioner contended:

> During trial proceedings, Hargrove objected to, and proposed a number of jury instructions. R. 205. He argued that the circuit courts were divided on the meaning of "honest services" while outlining sister circuits authority. *Id.* at 1-2. Hargrove proposed that the trial court instruct the jury that proof was required that Hargrove intended economic harm to the victims: "To prove a scheme to defraud, that a defendant reasonably foresaw that the scheme could cause some economic or pecuniary harm to the victim that is more than *de minimi.*" *Id.* at 2. The district court rejected the proposed

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[1] The District Court's Pacer Docket in 03 CR 779 fails to reflect any government filing in opposition to petitioner's post-trial motion.

> instruction and, over Hargrove's objection, allowed instructions 32 and 35 as tendered by the government. *Id.*; Tr. 3458-63.

At p. 31 of the government's direct appeal CA 7 brief, while urging Honest Services/Intangible Rights rejection, included:

> Here, the jury was instructed that to convict Hargrove for the honest services *counts* it had to find that a victim of the fraud scheme was owed a fiduciary duty and that Hargrove *intentionally* violated that duty for gain to himself or another. (Citation and record reference omitted).

Thus, the government, having failed to contend any Rule 30 [instruction issue(s)] "waivers" within the proceedings below, "waives" its (for the first time) *certiorari* challenge concerning this issue. *Cf. Steagald v. United States,* 451 U.S. 204, 209, 101 S.Ct. 1642, 1646 (1981) (The Government, however, may lose its right to raise factual issues of this sort before this Court * * * or when it has failed to raise such questions in a timely fashion during the litigation); *United States v. Archibald,* 589 F.3d 289, 298 n. 7 (6th Cir. 2009) (same). Therefore, the Court should reject the government's certiorari "waiver" contentions in light of the record below.

CONCLUSION

For the foregoing reasons, and for those presented in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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